

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,
1333 N. Oracle Road
Tucson, AZ 85705

Plaintiff,

V.

UNITED STATES FOREST SERVICE,
U.S. Department of Agriculture
1400 Independence Avenue SW
Washington, DC 20250

Defendant.

)
)
) **Case No:** _____

) COMPLAINT FOR DECLARTORY AND
) INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this action for declaratory and injunctive relief to redress violation of the Freedom of Information Act, 5 U.S.C. §§ 552 (“FOIA”), by Defendant U.S. Forest Service (“Forest Service”). In making a final determination in response to the Center’s July 1, 2011 FOIA request for records, the Forest Service failed to justify withholding, under one of the FOIA’s narrowly-construed exemptions to its disclosure mandate, 13 pages of responsive records related to the agency’s plan for responding to “white-nose syndrome” (“WNS”), an emerging fungal disease that is decimating North American bats.

2. WNS has killed seven million bats in the United States and Canada since it was documented in 2006, leading wildlife officials to call it the worst wildlife crisis in history. WNS has struck populations of at least six species of bats, including endangered Indiana bats, as it has spread rapidly across 19 states and four Canadian provinces. In addition to severe ecological

implications, the loss of pest-eating bats could result in up to \$53 billion annually in crop losses in the United States. Scientists believe WNS is spread by fungal spores that are transmitted from bat to bat and on the gear of people who use caves for recreational purposes (known as spelunking or caving), from infected to uninfected caves. As there is no effective way to stop WNS from wiping out hibernating and roosting bats once their cave habitats are infected, closure of caves to recreational activities – including on public lands managed by the Forest Service – may be the most important line of defense for saving bats from WNS.

3. Unlike many other federal land managers, the Forest Service's Northern Region – which includes 12 National Forests in northeastern Washington, northern Idaho, and Montana, and the National Grasslands in North Dakota and northwestern South Dakota – has not taken steps to close caves on its lands. Through its FOIA request, the Center is seeking to understand and to inform the public as to the Northern Region's lack of action in addressing WNS through cave closures.

4. In withholding 13 pages of responsive records that might shed light on the agency's inaction, the Forest Service cites FOIA Exemption 5's deliberative process privilege. However, the agency's own description of the records withheld shows the privilege does not apply – hence, the records must be disclosed to Plaintiff pursuant to the FOIA's disclosure mandate.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

VENUE

6. Venue in this Court is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation with almost 37,000 members. The Center is headquartered in Tucson, Arizona and has field offices throughout the United States, including Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Minnesota, Vermont, Florida, and Washington, D.C. The Center works to ensure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitats these species need to survive. For years, the Center has worked to protect bat species throughout the United States, and has urged federal agencies to take swift action in response to WNS. In addition to the FOIA request at issue here, the Center has petitioned federal land management agencies (including the Forest Service) for cave closures on public lands and other measures to protect bats, petitioned to list two bat species decimated by WNS pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), and collaborated on a status review of a third bat species – the little brown bat – that has been devastated by the disease. The Center has also advocated for increased federal funding for WNS research and management, urged state fish and wildlife agencies to take proactive measures in response to the WNS threat, and pursued administrative appeals of state and federal projects that would further imperil bats now threatened by WNS. The Center brought litigation in this Court to challenge the U.S. Bureau of Land Management’s issuance of a special use permit for a recreational caving convention in Colorado in July 2011, due to the threat of WNS.

8. Defendant U.S. FOREST SERVICE is an agency of the United States, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f)(1).

THE FREEDOM OF INFORMATION ACT

9. FOIA contains a strict disclosure mandate and requires, *inter alia*, that all federal

agencies promptly provide copies of all non-exempt agency records to persons who make a request for records that reasonably describes the nature of the records sought, and which conforms to procedures for such requests. 5 U.S.C. § 552(a)(3)(A). FOIA requires federal agencies to make a determination on a FOIA request within 20 business days after receipt of the request, unless the agency expressly provides notice to the requester of “unusual circumstances” meriting more time. 5 U.S.C. § 552(a)(6)(A).

10. Among FOIA’s narrowly-construed, statutory exemptions to its disclosure mandate is Exemption 5, which allows (but does not require) an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 encapsulates several privileges, including the deliberative process privilege, which allows a federal agency to withhold responsive records where the records contain material that is both “predecisional” and “deliberative.” For a record to be “predecisional”, it must reflect the give-and-take of a consultative process before the agency took final action. Portions of a record are “deliberative” only when they involve opinions or are recommendatory in nature; factual information contained in such a record is not exempt from disclosure.

11. Even where the deliberative process privilege lawfully applies, an agency must provide reasonably-segregable portions of records after deleting any lawfully-exempt portions. 5 U.S.C. § 552(b). Exemption 5 does not apply to documents that were created by third parties, shared with them, or prepared by independent consultants acting solely on behalf of their own interests and not those of the agency. The FOIA provides for *de novo* judicial review in district court, and places the burden for sustaining any exemptions on the federal agency. 5 U.S.C. § 552(a)(4)(B).

12. A person who requests but does not receive all responsive records may, after exhausting her administrative remedies, seek legal redress in federal district court to “enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. 552(a)(4)(B).

13. Pursuant to FOIA, the Court may assess attorney fees and litigation costs against the agency if the Plaintiff substantially prevails in the action. 5 U.S.C. § 552(a)(4)(E).

THE CENTER'S FOIA REQUEST

14. On July 1, 2011, the Center sent a FOIA request to the Forest Service’s Northern Region, for:

- I. Any and all documents, January 1, 2009 to July 1, 2011, relating to U.S. Forest Service (USFS) Northern Region’s issuance of policy regarding the disease white-nose syndrome in bats and/or the fungus *Geomyces destructans*, including memos, directives, and guidance.
- II. Any and all documents January 1, 2009 to July 1, 2011, relating to the process the Northern Region is taking to provide direction/instruction/policy concerning cave closures or decontamination or other procedures to halt or slow the spread of white-nose syndrome and/or *Geomyces destructans*.

15. On August 4, 2011, Northern Region Regional Forester Leslie Weldon sent the Center responsive records, many of which were heavily redacted, but withheld 13 pages of responsive records in their entirety, citing Exemption 5’s deliberative process privilege. The letter stated that the Center had 45 days to appeal the determination by delivery, U.S. mail, or email to the Chief of the Forest Service.

16. By email dated September 15, 2011, the Center appealed the agency’s withholding of 13 pages of responsive records to the Chief, U.S. Forest Service, and also mailed the appeal by U.S. mail. In its appeal, the Center contested the Forest Service’s failure to justify

its reliance on Exemption 5, and its failure to disclose any segregable, factual material contained in the withheld records.

17. By letter dated November 10, 2011, the Forest's Service's Acting Deputy Chief upheld the agency's refusal to disclose the 13 pages of responsive records in their entirety. This constituted the agency's final determination in response to the Center's FOIA request.

18. The Forest Service's final response stated that the 13 pages consist of records which contain information about the spread of WNS, caves that are subject to closure, and an application for entry into a cave that may have been submitted to the Forest Service or provided to a third party. The Forest Service did not explain why these records are predecisional or deliberative. The agency did not describe the records with specificity that would show why they may be withheld in their entirety pursuant to Exemption 5.

CLAIM FOR RELIEF

VIOLATION OF FOIA: Failure to Disclose All Records Responsive to Plaintiff's July 1, 2011 FOIA Request

19. Plaintiff hereby incorporates all preceding paragraphs.

20. The Forest Service has failed to carry its burden to justify its withholding of 13 pages of records responsive to the Center's July 1, 2011 FOIA request, and any reasonably-segregable portions thereof, including records, such as a cave entry application, that may have been created by or shared with third parties.

21. The Forest Service's failure to justify its basis for withholding 13 pages of responsive records is a violation of FOIA.

REQUEST FOR RELIEF

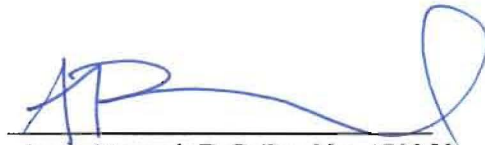
Plaintiff respectfully requests that the Court enter Judgment for Plaintiff providing the

following relief:

- A. Declare that the Forest Service has violated FOIA by failing to justify its withholding of 13 pages of records responsive to the Center's July 11, 2011 FOIA request. 5 U.S.C. § 552(a)(4)(F) and 28 U.S.C. § 2201.
- B. Issue an order enjoining the Forest Service's failure to comply with FOIA and directing it to disclose to Plaintiff all non-exempt records responsive to Plaintiff's July 11, 2011 FOIA request. *See* 28 U.S.C. § 2202.
- C. Grant Plaintiff's costs of litigation, including reasonable attorney fees, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and,
- D. Provide such other relief as the Court deems just and proper.

DATED: This 16th day of May, 2012.

Respectfully submitted,



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